

## APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice  
A. G. P. Pullan.

1929  
January,  
25.

LALA JAGMOHAN DASS (PLAINTIFF-APPELLANT) v.  
LALA INDAR PRASAD AND OTHERS (DEFENDANTS-  
RESPONDENTS).\*

*Transfer of Property Act (IV of 1882), section 41—Transferee is entitled to claim the protection of section 41 Transfer of Property Act only if he has made necessary inquiry about the title of the transferer—One of two co-owners alone bringing a suit on a mortgage joining the other as defendant and after obtaining a decree selling the decree to a puisne mortgagee—Remedy of the other co-owner for recovery of his share under the mortgage.*

Only those persons are entitled to claim protection under section 41 of the Transfer of Property Act (IV of 1882) who in spite of necessary inquiry have not been able to discover who the real owner of the property is, and who have in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him. If the transferee has not made necessary inquiries about the title of the real owner the protection afforded by the said section is not available to him.

Where on a partition between two brothers a mortgage-deed was allotted to both of them in equal shares and the suit was brought by one of them on the basis of that mortgage-deed impleading the other brother as a defendant who did not appear in the case and did not apply to be impleaded as plaintiff and the suit was decreed only in favour of the brother who had brought the suit and that brother alone sold the decree to the present defendants who were also puisne mortgagees of the mortgaged property and the second brother then brought the present suit against his brother who had obtained the decree and his transferees, *held*, that his brother having obtained the decree alone was entitled to sell it and to give a discharge to the judgment debtor or to the puisne mortgagee and if such a discharge had been given and money obtained by his brother the sole remedy to which the plaintiff

\*First Civil Appeal No. 81 of 1928, against the decree of Mirza Mohamad Munim Bakht, Additional Subordinate Judge of Lucknow, dated the 22nd of March, 1928.

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was entitled was to claim his share in the money realized by his brother.

Mr. *Daya Kishan Seth*, for the appellant.

Messrs. *Ram Bharose Lal* and *Mukand Behari Lal*, for the respondents.

MISRA and PULLAN, JJ. :—This is an appeal arising out of a declaratory suit. The facts of the case are that the plaintiff-appellant, Lala Jagmohan Das, and his brother Lala Indar Prasad, defendant No. 1, constituted prior to 1915 members of a joint Hindu family; that out of the joint family funds money was advanced to one Musammat Bakhtawar Begam by virtue of a mortgage-deed, dated the 20th of July, 1914, in which was hypothecated the property situate in the district of Cawnpore and in the city of Lucknow and that in a partition between the two brothers which took place in 1915 the said mortgage-deed had been allotted in equal shares to both of them. A suit was brought on the basis of this mortgage-deed by Lala Indar Prasad alone, and a decree was passed on the 20th of February, 1925, in his favour. It appears that when Lala Indar Prasad instituted the suit on the aforesaid mortgage he also impleaded the plaintiff-appellant as a defendant in that case alleging that he had declined to join him as a plaintiff in the suit. It further appears that the said decree was transferred by Lala Indar Prasad to defendants Nos. 2 and 3, who are the sons of one Lala Pursottam Das, who is also a defendant (No. 5) in this case. His brother Lala Jugul Kishore has been impleaded as defendant No. 4. It would thus appear that defendants Nos. 2 to 5 constitute a joint Hindu family. The present suit has been brought by the plaintiff-appellant for obtaining a declaratory decree to the effect that he is the owner of half the decree since the mortgage on the basis of which the said decree was passed was owned in equal shares by him and his brother defendant No. 1, that the sale-deed executed by Lala Indar Prasad in favour of the defen-

defendants Nos. 2 and 3 in respect of the entire decree is null and void, and that he is entitled to have the decree executed to the extent of his half share in it.

The suit was contested principally by defendants Nos. 2 and 3, who urged in their defence that the decree obtained by defendant No. 1 being in his favour alone he was entitled to have it executed and realize the whole amount due; that they having paid the whole amount due under the decree had obtained a sale-deed in respect thereof from defendant No. 1; and that therefore the plaintiff had no remedy against defendants Nos. 2 and 3, but should obtain from defendant No. 1 half the amount which had been paid by them to him as sale price for the said decree. They also contended that they had purchased this decree out of their own personal funds and not out of the funds of the joint family, to which they and their father and uncle (defendants Nos. 4 and 5) belonged, and that they having purchased it from an ostensible owner, the plaintiff was not entitled to avoid the sale executed in their favour under the provisions of section 41 of the Transfer of Property Act IV of 1882.

The suit was tried by the learned Additional Subordinate Judge of Lucknow to whose court it had been transferred and who by his decree, dated the 22nd of March, 1928, gave the plaintiff a decree against defendant No. 1 for half the consideration, for which the original decree had been transferred by him in favour of defendants Nos. 2 and 3 and dismissed the suit so far as the other defendants were concerned. This decree was passed upon a finding to the effect that the defendants Nos. 2 and 3 having taken a sale-deed of the decree from Lala Indar Prasad, in whose favour it stood, the plaintiff was not entitled to claim any relief against them, but was only entitled to claim from defendant No. 1 half the sale consideration for which the decree had been sold.

The plaintiff-appellant has brought the present appeal against this decree and the contention now urged

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on his behalf is to the effect that the mortgage-deed executed by Musammat Bakhtawar Begam being the property of the plaintiff and his brother defendant No. 1 in equal shares, he must be held to be entitled to be the owner of the decree also to the extent of half and that, therefore, the sale-deed executed by defendant No. 1 in favour of defendants Nos. 2 and 3 should be considered operative only to the extent of half, and that, therefore, they should be declared as entitled to execute the decree only to that extent.

We have heard the arguments in this case at great length and it appears to us that the decree passed by the learned Subordinate Judge is correct and should, therefore, be maintained.

It was argued on behalf of the plaintiff-appellant that defendants Nos. 2 and 3 cannot invoke in their favour the protection of section 41 of the Transfer of Property Act, since they must be presumed to know full well that the decree in dispute was the joint property of plaintiff-appellant and of defendant No. 1. We have looked into the record and it appears that defendants Nos. 4 and 5 brought a suit against the son and husband of the mortgagor Bakhtawar Begam on the basis of a mortgage executed by her in their favour on a date subsequent to the deed, in which the plaintiff is admittedly entitled to a half share. The decree was passed in their favour on the basis of the said mortgage-deed on the 27th of May, 1927. It is clear from the proceedings of that suit that the rights of plaintiff and of defendant No. 1, who were impleaded in that suit in the capacity of prior mortgagees as defendants Nos. 3 and 4, were fully known to defendants Nos. 4 and 5, who were plaintiffs in that suit. It is also equally clear from the evidence on the record that defendants Nos. 2 to 5 constitute a joint family. It is also admitted that defendants Nos. 2 and 3 have failed to prove that the money with

which they purchased the decree from Lala Indar Prasad was their own personal money. Under these circumstances defendants Nos. 2 and 3 being members of a joint family with defendants Nos. 4 and 5, they must be saddled with the knowledge of the fact that the decree obtained by Lala Indar Prasad was his property as well as that of plaintiff-appellant to the extent of a half-and-half.

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The said defendants having full notice of the title of the plaintiff-appellant cannot be allowed to seek protection of section 41 of the Transfer of Property Act. It is a settled rule of law that only those persons are entitled to claim protection under that section, who in spite of necessary inquiry have not been able to discover who the real owner of the property is, and who have, in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him. If the transferee has not made necessary inquiries about the title of the real owner the protection afforded by the said section is not available to him. We are, therefore, constrained to hold that defendants Nos. 2 and 3 cannot be allowed to take advantage of section 41 of the Transfer of Property Act IV of 1882.

There is, however, another aspect of the case from which it has to be looked at. It would appear from the facts already stated in the earlier portion of this judgment that the plaintiff-appellant refused to join defendant No. 1 as his co-plaintiff when the latter brought the suit on the basis of the mortgage-deed, dated the 20th of July, 1914. He had, therefore, to be impleaded as a defendant in the case and in spite of the fact that notice of the suit went to him, he never appeared in court, nor did he express his willingness to be impleaded in the said suit as a co-plaintiff along with defendant No. 1. It was due to his own action that a decree was passed exclusively in favour of defendant No. 1. If any complications have now arisen from that situation it is the plaintiff-

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appellant who has to thank himself. It appears to us that after the decree in the mortgage suit was passed in favour of defendant No. 1 alone he was entitled to execute it and to give discharge to the judgment-debtor or to the puisne mortgagee. If such a discharge has been given and money has been received by defendant No. 1, it would not be open to the plaintiff-appellant to urge that this position was not legally available to defendant No. 1. The sole remedy to which he would be entitled in such a case would be to claim his half share in the money paid to defendant No. 1. We are inclined to hold that the sale of the decree in favour of defendants Nos. 2 and 3 should place them in the same position, as if they were judgment-debtors and had by making the payment obtained a discharge. It is admitted that the defendants Nos. 2 and 3 are puisne mortgagees of the property mortgaged in favour of the plaintiff-appellant and defendant No. 1 under deed, dated the 20th of July, 1914, and in such a case it would be open to them to pay the decretal money to defendant No. 1 in whose favour alone the decree stood and to obtain a discharge in respect of the mortgage, on the basis of which the decree had been passed in favour of defendant No. 1.

We are, therefore, of opinion that the defence of defendants Nos. 2 and 3 must prevail, and that it is not open for the plaintiff-appellant to question the sale of the decree in favour of defendants Nos. 2 and 3 when it was effected by defendant No. 1, in whose favour alone it stood, and which position was brought about by the own conduct of the plaintiff-appellant himself. The learned Subordinate Judge was, therefore, correct in passing a decree for half the sale consideration against defendant No. 1 and in dismissing his claim for a declaratory decree against the other defendants.

The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*